**PROPOSED**

# 18. EMPLOYMENT—FEDERAL RAILWAY SAFETY ACT

## 18.00 OVERVIEW (GENERAL)

The Federal Railway Safety Act, 49 U.S.C. § 20109 *et seq.*, (the "FRSA") was enacted in 1970 "to promote safety in every area of railroad operations and reduce railroad-related accidents." 49 U.S.C. § 20101. In 1980, the FRSA was expanded to include protections against retaliation for railroad employees engaged in protected conduct or activities, such as reporting violations of safety laws or refusing to work in hazardous conditions. *Ray v. Union Pacific RR. Co.*, 971 F.Supp.2d 869, 877 (S.D.Iowa 2013) (referring to Fed. R.R. Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811 (1980)). In 2007, Congress again amended the FRSA to include additional categories of protected activities. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 1221 Stat. 266, 4444 (2007). The FRSA currently states that a railroad employer: "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done ..." to, among other things, report or attempt to report a work-place injury or illness. 49 U.S.C. § 20109(a)(4). The FRSA also states that a railroad may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. 49 U.S.C. § 20109(c)(1).

The 2007 amendments also incorporated the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR-21"), which establishes the standards of liability and burdens of proof for administrative and civil actions. *See* 49 U.S.C. § 20109(d)(2)(A). AIR-21 employs a two-part, burden-shifting test. Plaintiff must first

demonstrate by the greater weight of the evidence, that (1) he engaged in a protected activity; (2) the railroad employer knew or suspected—actually or constructively—that plaintiff engaged in a protected activity; (3) plaintiff suffered an adverse action; and (4) circumstances raise the inference that the protected activity was a contributing factor in the adverse action. ~~*Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157-59 (3d. 2013) (internal citation omitted~~*Kuduk v. BNSF Railway Co.*, 768 F.3d 786 (8th Cir. 2014). "The contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." *Kuduk v. BNSF Railway Co.*, 768 F.3d 786 (8th Cir. 2014); *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716 (8th Cir. 2017). After plaintiff establishes his or her affirmative case, the burden shifts to the railroad to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. ~~*Id.* at 159.~~ *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157-59 (3d. 2013) (internal citation omitted.

The Act is administered by the Occupational Safety and Health Administration (OSHA), and violations are investigated pursuant to the procedures of 49 U.S.C. § 42121(b). 49 U.S.C. § 20109(d)(2). Action is commenced by filing a complaint with OSHA within 180 days of the violation. 49 U.S.C. § 20109(d)(2)(ii). At the conclusion of OSHA's investigation the Secretary of Labor, acting through the Regional Administrator of the OSHA region where the case was investigated, will issue findings and a preliminary order. Within 30 days of receipt of the findings, objections and a request for hearing before an Administrative Law Judge may be filed. Hearings before the Administrative Law Judge are governed by 49 C.F.R. Subtitle A, Part 18. Final decisions may be appealed to the United States Court of Appeals. 49 U.S.C. § 20109(d)(4). If there has been no final decision within 210 days of the filing of the complaint, the employee

may bring an original action in Federal District Court for *de novo* review in a jury trial. 49 U.S.C. § 20109(d)(3)

## CHAPTER 18 INSTRUCTIONS AND VERDICT FORM

## 18.20 DEFINITIONS: "GREATER WEIGHT OF THE EVIDENCE" AND "CLEAR AND CONVINCING EVIDENCE"

Plaintiff [insert name]'s claim [1] must be proven by the "greater weight of the evidence." [2]

A fact has been proved by the greater weight of the evidence if you find that it is more likely true than not true.

Defendant [insert name]'s defense [3] must be proven by "clear and convincing evidence." [4] Clear and convincing evidence means that the thing to be proved is highly probable or reasonably certain. [5] Clear and convincing evidence requires a higher degree of persuasion than the greater weight of the evidence.

You probably have heard the phrase "proof beyond a reasonable doubt." That is a stricter standard than both the "greater weight of the evidence" standard and the "clear and convincing evidence standard." The "proof beyond a reasonable doubt" standard applies in criminal cases, but not in this civil case; so put it out of your mind.

### Notes on Use

1. Use the plural if plaintiff submits more than one elements of the claim instruction.

2. The burden of proof standard that applies to plaintiff's prima facie case is the "greater weight of the evidence" standard. *Araujo v. N.J. Transit Rail Operations, Inc*., 708 F.3d 152, 160 (3d Cir. 2013).

3. Use the plural if defendant submits more than one affirmative defense instruction.

4. The burden of proof standard that applies to defendant's case once plaintiff's prima fascia case has been proven is the "clear and convincing evidence" standard. *Araujo v. N.J. Transit Rail Operations, Inc*., 708 F.3d 152, 159 (3rd Cir. 2013).

5. In *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) the Court stated that clear and convincing evidence required the fact finder to come to an "abiding conviction that the truth of … the factual contentio~~n~~s are highly probable." In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 285 (1990), the Court stated that clear and convincing evidence means "evidence which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Cornell v. Nix*, 119 F.3d 1329, 1334-35 (8th Cir. 1997) (citing *Colorado v. New*

*Mexico*, 467 U.S. 310, 316 (1984)).

## 18.40 ELEMENTS OF CLAIM: DISCRIMINATION DUE, IN WHOLE OR IN PART, TO ENGAGEMENT IN PROTECTED ACTIVITY

Your verdict must be for plaintiff [insert name] and against defendant [insert name] on plaintiff's claim [here generally describe claim] if all of the following elements have been proved by the greater weight of the evidence:

First, plaintiff [insert name] [briefly describe the protected activity [1] plaintiff engaged in (e.g. "notified defendant [insert name] of plaintiff's work-related personal injury")];

Second, defendant knew [2] plaintiff [insert name] [restate the protected activity from Paragraph First (e.g. "notified it of plaintiff's work-related personal injury")];

Third, defendant [insert name] [briefly describe the adverse action [3] at issue (e.g. "fired plaintiff')];

Fourth, defendant [insert name] intentionally retaliated against plaintiff by [4] [restate the adverse action from Paragraph Third (e.g. "~~fired~~ firing plaintiff')], due, in whole or in part, to ~~in whole or in part due to~~ plaintiff [insert name] [restate the protected activity from Paragraph First (e.g. "having notified defendant of plaintiff's work related injury")].

If any of the above elements has not been proved [or if defendant (insert name) is entitled to a verdict under Instruction No. __ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name], and you need not proceed further in considering this claim. [You may find that defendant [insert name]'s [restate the adverse action from Paragraph Third (e.g. "firing plaintiff" [insert name])] was due, in whole or in part, to plaintiff [insert name]'s [briefly describe the protected activity plaintiff engaged in (e.g. "notifying defendant [insert name] of plaintiff [insert name]'s work-related personal injury")] if it has been proved that defendant [insert name]'s stated reason for [restate the adverse action from Paragraph Third (e.g. "firing plaintiff" [insert name])] is a pretext to hide retaliation.]

## Notes on Use

1. From 49 U.S.C. § 20109 (a) (1-7) or (b) (1) (A-C).

2. The second element of a prima facie case under the Act is that defendant "knew or suspected, actually or constructively, that (plaintiff) engaged in the protected activity." *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014). If the case is submitted upon a claim that defendant suspected that plaintiff engaged in the protected activity, or if the case is submitted on a claim of constructive knowledge, Paragraph Second should be modified accordingly.

3. The FRSA provides that a railroad or other entity covered by the Act "may not discharge, demote, suspend, reprimand, or in any way discriminate against an employee if such discrimination is due, in whole or in part, to" the employees engagement in the protected activities that are the subject of the Act. The full scope of what constitutes adverse action has not been decided by case law. Whether it is similar or identical to tangible employment action (Chapter 8) or materially adverse action (Chapter 10) is an open question. For instance, the Committee is aware of no appellate case that specifically addresses whether intimidation alone is actionable under the Act. In *Ray v. Union Pac. R.R. Co.*, 971 F.Supp. 2d 869, 894-894, n. 28 (D.C. S.D. Ia. 2013) summary judgment for the defense was denied on a claim based upon intimidation.

4. The contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity. *Kuduk v. BNSF Railway Co.*, 768 F.3d 786 (8th Cir. 2014); *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716 (8th Cir. 2017). The FRSA's employee-protections provision is based on "discriminatory animus"; as such a showing of intentional retaliation is required. *Blackorby* at _____. Other circuits have held otherwise. *See, e.g.*, _____.

## 18.41 Elements of Claim: Medical Attention (Denial, Delay or Interference)

Your verdict must be for plaintiff [insert name] and against defendant [insert name] if all of the following elements of plaintiff claim [generally describe claim] have been proved by the greater weight of the evidence:

First, plaintiff [insert name] was injured during the course of his/her employment; and

Second, defendant [insert name] [(denied) (delayed) (interfered with)] [(medical treatment) (first aid treatment)] of plaintiff [insert name].

If any of the above elements has not been proved, [or if defendant (insert name) is entitled to a verdict under Instruction No. __ (insert number of affirmative defense instruction),] then your verdict must be for defendant [insert name].

## 18.42 ELEMENTS OF CLAIM: MEDICAL ATTENTION (DISCIPLINE FOR REQUESTING OR FOLLOWING MEDICAL TREATMENT)

Your verdict must be for plaintiff [insert name] and against defendant [insert name] if all of the following elements of plaintiff's claim [generally describe claim] have been proved by the greater weight of the evidence:

First, plaintiff [insert name] [(requested medical treatment) (requested first aid treatment) (followed the [(orders) (treatment plan)])] of his/her treating physician when he/she [briefly describe what plaintiff did to follow the orders or treatment plan of his/her treating physician (e.g. "marked off from work to attend physical therapy")];

Second, defendant [insert name] [(disciplined) (threatened to discipline)] plaintiff due in whole or in part to plaintiff [insert name] [restate the protected activity from Paragraph First (e.g. "having marked off work to attend physical therapy ordered by his/her treating physician")].

If any of the above elements has not been proved [or if defendant (insert name) is entitled to a verdict under Instruction No. __ (insert number of affirmative defense instruction)], then your verdict must be for defendant [insert name], and you need not proceed further in considering this claim. [You may find that defendant [insert name]'s [restate the prohibited action from Paragraph Third (e.g. "disciplining plaintiff" [insert name])] was due, in whole or in part, to plaintiff [insert name]'s [restate the protected activity from Paragraph First (e.g. "having marked off work to attend physical therapy ordered by his/her treating physician")] if it has been proved that defendant [insert name]'s stated reason for [restate the prohibited action from Paragraph Third (e.g. "disciplining plaintiff" [insert name])] is a pretext to hide retaliation.]

## 18.50 AFFIRMATIVE DEFENSE INSTRUCTION APPLICABLE TO ALL VERDICT DIRECTORS

Your verdict must be for defendant [insert name] if it has been proved by clear and convincing evidence that defendant would have taken the same action of [insert action] (e.g. charging plaintiff [insert name] with a rules violation and firing plaintiff [insert name]) even if plaintiff [insert name] had not [insert protected activity] (e.g. notified defendant [insert name] of plaintiff [insert name]'s work-related personal injury).

~~49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121(b)(2)(B)(iii)(iv)~~
~~*Ray v. Union Pacific RR. Co.*, 2013 WL 5297172, at *15 (S.D. Iowa Sept. 13, 2013)~~
~~*Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013)~~
~~*Kuduk v. BNSF Ry. Co.*, 2013 WL 5413448, at *9 (D. Minn. Sept. 26 2013)~~

## 18.70 DAMAGES: ACTUAL

If you find in favor of plaintiff [insert name] under Instruction No. __ (insert number of the elements of claim instruction), and if you do not find in favor of defendant [insert name] in response to Instruction No. __ (insert number of affirmative defense instruction), then you must award plaintiff [insert name] such sum as you find will fairly and justly compensate him/her for any of the following damages you find he/she sustained [and is reasonably certain to sustain in the future] [1] as a result of defendant [insert name]'s [restate the adverse action as set out in the elements of claim instruction (e.g. "firing of plaintiff [insert name]," "delaying first aid treatment of plaintiff [insert name]" or "disciplining plaintiff [insert name]")]:

[List the types of damages claimed and supported in the evidence.] [2]

[Any award you make for (insert the type of damages that must be reduced to present value) must be reduced to present value.] [3]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.]

[Your award should not include any damages you find plaintiff (insert name) could have avoided through the exercise of due diligence under the circumstances as submitted in Instruction No. __ (insert number of mitigation of damages instruction).] [34]

### Notes on Use

1. Include this language if the evidence supports a submission of any item of future damage.

2. If more than one type of damage is claimed by plaintiff and supported in the evidence, use the bracketed language such that this sentence will read: "Plaintiff [insert name]'s claim for damages includes the following distinct types of damages, and you must consider them

separately:" If only one type of damages is claimed by plaintiff and supported in the evidence, the bracketed language should not be included, and this sentence will read: "Plaintiff [insert name]'s claim for damages includes the following damages:" List here the types of damages claimed and supported in the evidence in the particular case. 49 U.S.C. 20109(e)(1) provides, "In general. – An employee prevailing … shall be entitled to all relief necessary to make the employee whole." 49 U.S.C. 20109(e)(2) lists certain damages that the "(r)elief … shall include. These damages are "(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) any backpay, with interest; and (C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including his litigation costs, expert witness fees, and reasonable attorney fees." In the employment law setting, reinstatement and front pay typically are considered equitable remedies and are decided by the court. Whether this is how these items of damage will be decided under this whistleblower statute has not been addressed in the case law. Nor has the case law under this statute addressed whether nominal damages may be awarded.

~~3. List here the types of damages claimed and supported in the evidence in the particular case. 49 U.S.C. 20109(e)(1) provides, "In general. – An employee prevailing … shall be entitled to all relief necessary to make the employee whole." 49 U.S.C. 20109(e)(2) lists certain damages that the "(r)elief … shall include. These damages are "(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) any backpay, with interest; and (C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including his litigation costs, expert witness fees, and reasonable attorney fees." In the employment law setting, reinstatement and front pay typically are considered equitable remedies and are decided by the court. Whether this is how these items of damage will be decided under this whistleblower statute has not been addressed in the case law. Nor has the case law under this statute addressed whether nominal damages may be awarded.~~

43. It may be reversible error to refuse to give a mitigation of damages instruction when sufficient evidence has been presented to support it. Consider *Kauzlarich v. Atchison, Topeka & Santa Fe Ry. Co.*, 910 S.W.2d 254 (Mo. banc 1995). The burden of pleading and proving failure to mitigate damages is on defendant. *Sayre v. Musicland Group, Inc.*, 850 F.2d 350, 355-56 (8th Cir. 1988); *Modern Leasing v. Falcon Mfg. of California*, 888 F.2d 59, 62 (8th Cir. 1989).

## 18.72 DAMAGES: PUNITIVE

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of plaintiff [insert name] under Instruction _____ and do not find in favor of defendant [insert name] in response to Instruction _____, then you must decide whether defendant [insert name] acted with malice or reckless indifference to plaintiff's [insert name] right not to be [briefly describe the adverse action (e.g. discriminated, retaliated, intimidated)] against on the basis of [restate the protected activity (e.g. "having notified defendant [insert name] of plaintiff's [insert name] work related injury")]. Defendant [insert name] acted with malice or reckless indifference if:

> it has been proved that [insert the name(s) of the defendant] or manager [insert applicable name] who engaged in the adverse action to plaintiff [insert name] knew that the [state adverse action taken (e.g., termination, suspension)] was in violation of the law prohibiting [discrimination, retaliation, intimidation], or acted with reckless disregard of that law.

[However, you may not award punitive damages if it has been proved that defendant [insert name] made a good-faith effort to comply with the law prohibiting [discrimination, retaliation, intimidation].

If you find that defendant [insert name] acted with malice or reckless indifference to plaintiff's [insert name] rights [and did not make a good-faith effort to comply with the law], then, in addition to any other damages to which you find plaintiff [insert name] entitled, you may, but are not required to, award plaintiff [insert name] an additional amount as punitive damages for the purposes of punishing defendant [insert name] for engaging in such misconduct and deterring defendant [insert name] and others from engaging in such misconduct in the future.

You should presume that a plaintiff [insert name] has been made whole for [his, her, its] injuries by the damages awarded under Instruction _____.

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible defendant's [insert name] conduct was. In this regard, you may consider [whether the harm suffered by plaintiff [insert name] was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether defendant's [insert name] conduct that harmed plaintiff [insert name] also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed plaintiff [insert name].

2. How much harm defendant's [insert name] wrongful conduct caused plaintiff [insert name] [and could cause plaintiff [insert name] in the future]. [You may not consider harm to others in deciding the amount of punitive damages to award.]

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering defendant's [insert name] financial condition, to punish defendant [insert name] for [his, her, its] wrongful conduct toward plaintiff [insert name] and to deter defendant [insert name] and others from similar wrongful conduct in the future.

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to plaintiff [insert name] [and cannot exceed $250,000]. [1]

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.]

[You may not award punitive damages against defendant[s] for conduct in other states.]

## Note on Use

1. The statute limits punitive damages to $250,000 (49 U.S.C. § 20109). Case law does not require that the jury be advised of this limit. The committee believes the better approach would be to not tell the jury about the limit. The Court can reduce any award in excess of the statutory cap.

## 18.80 GENERAL VERDICT FORM

Note: Complete the following paragraph by writing in the name required by your verdict.

On the claim of plaintiff [insert name], [as submitted in Instruction ____ ], we find in favor of:

_____

(Plaintiff [insert name]) or (Defendant [insert name])

Note: Answer the next question only if the above finding is in favor of plaintiff [insert name]. If the above finding is in favor of defendant [insert name], have your foreperson sign and date this form because you have completed your deliberations on this claim.

Question No. 1: Has it been proved that defendant [insert name] would have [describe adverse action] plaintiff [insert name] regardless of plaintiff's [insert name] engagement of a protected activity as referred in Instruction _____.

_____Yes _____No

(Mark an "X" in the appropriate space)

Note: Complete the following paragraphs only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We assess plaintiff's [insert name] damages as follows:

A. Lost wages and benefits from [date of adverse action] through [date of your verdict]:

$_____ (stating the amount [or, if none, write the word "none"]).

B. Plaintiff's [insert name] other damages, excluding past and future lost wages and benefits: [1]

$_____ (stating the amount [or, if you find that plaintiff's [insert name] damages do not have a monetary value, write in the nominal amount of One Dollar ($1.00)]) [2].

[We assess punitive damages against defendant, as submitted in Instruction _____, as follows:

$_____ (stating the amount or, if none, write the word "none").]

_____
Foreperson

Dated: _____

**Notes on Use**

1. This format assumes that ~~back~~front pay and related benefits are equitable claims to be decided by the Court.

2. It is unclear whether nominal damages are authorized in the case law. If the Court believes they are permissible, the bracketed phrase should be included.